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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1397

CITY OF KANSAS CITY, MISSOURI,
Appellant,

vs.

ROBERT J. DARBY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

JURISDICTIONAL STATEMENT

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No. .....

CITY OF KANSAS CITY, MISSOURI,
Appellant,

vs.

ROBERT J. DARBY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

JURISDICTIONAL STATEMENT

Appellant appeals from the final order and judgment of the Supreme Court of Missouri entered January 10, 1977, overruling Appellant's Motion for Rehearing and its Judgment entered December 13, 1976, rendering Kansas City's Obscenity Ordinance unenforceable although continuing to uphold said ordinance's constitutional validity (*S.S. & W., Inc. et al.* v. *City of Kansas City, Missouri*, 421 U.S. 925).

OPINIONS BELOW

The opinion of the Municipal Court of Kansas City, Missouri is not reported. The opinion of the Circuit Court of Jackson County, Missouri, Sixteenth Judicial Circuit, is not reported. The opinion of the Missouri Court of Appeals, Kansas City District, is not reported. The opinion of the Supreme Court of Missouri is reported at 544 SW2d 529. All opinions are set forth at Appendix A to this statement, together with the order of the Missouri Supreme Court denying Rehearing.

JURISDICTION

Robert J. Darby was convicted of exhibiting obscene materials under Kansas City, Missouri Code, Section 26.142(d) (1971) (Ordinance No. 39144), and Section 1.17 of the Kansas City Code, August 24, 1973, the Court finding the Defendant guilty and imposing upon said Defendant for the offense a sentence of ninety (90) days at the Municipal Correctional Institution. A timely appeal was filed to the Circuit Court of Jackson County, Missouri, Sixteenth Judicial Circuit, pursuant to the applicable court rules, wherein the Defendant, Robert J. Darby, exercised his absolute right to a trial de novo by jury. A jury convicted Robert J. Darby, February 28, 1974, of knowingly exhibiting obscene materials and affixed his punishment at 120 days confinement and a $500.00 fine. Timely motion for new trial was filed with the Circuit Court of Jackson County, Missouri, Sixteenth Judicial Circuit, which was overruled, and a timely appeal was filed to the Missouri Court of Appeals, Kansas City District. The case was briefed, argued and ruled by said Court, March 29, 1976. Timely

motion to transfer said cause to the Supreme Court of Missouri was filed by the Defendant, which transfer was granted by the Supreme Court of Missouri, June 15, 1976. Said cause was argued to the Supreme Court of Missouri, sitting en banc, September 21, 1976, and said Court reversed said conviction, December 13, 1976. A timely filed motion for rehearing was by the Court overruled January 10, 1977, and timely notice of appeal to this Court filed with the Supreme Court of Missouri, April 5, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(2). Cases that sustain the jurisdiction of this Court include *Ludwig* v. *Massachusetts*, 423 U.S. 945, 46 L. Ed. 2d 276, 96 S. Ct. 354 (1975); *North* v. *Russell*, 422 U.S. 1040, 45 L. Ed. 2d 692, 95 S. Ct. 2652 (1975); *Baldwin* v. *New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970); *Duncan* v. *Louisiana*, 319 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *Evers* v. *Dwyer*, 358 U.S. 202, 79 S. Ct. 178, 3 L. Ed. 2d 222 (1959); *Butters* v. *State of Michigan*, 352 U.S. 380, 77 S. Ct. 524, 1 L. Ed. 2d 412 (1957); and *Nashville, C. and St. L. R. Company* v. *Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 ALR 1191 (1933).

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

1. Whether or not the First and Fourteenth Amendments to the United States Constitution mandate that the question of obscenity vel non is solely to be decided by a jury pursuant to this Court's holdings in the cases of *Miller* v. *California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; *Hamling* v. *United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590; *Jenkins* v. *Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642; as construed by the Missouri Supreme

Court in the case of *McNary* v. *Carlton*, 527 SW2d 343 (Mo. banc, 1975) in a judicial forum, a Municipal Police Court, where the trial by jury of a "petty offense" is prohibited by ordinance, Section 22.1, Kansas City Code of General Ordinances, Appendix B.

2. Whether or not it is constitutionally permissible for the Supreme Court of Missouri to ground its decision in this instant case, on the case of *Callahan* v. *Wilson*, 127 U.S. 540, 8 S. Ct. 1301, 32 L. Ed. 223 (1888), when such case was impliedly overruled by this Court as applied to State Courts in its dismissal, for want of a substantial Federal question, of the case of *State ex rel. Cole* v. *Nigro*, 471 SW2d 933 (Mo. banc, 1971); 404 U.S. 804, 30 L. Ed. 2d 36, 92 S. Ct. 122, reh. den. 404 U.S. 960, 30 L. Ed. 2d 278, 92 S. Ct. 309, which case held that a right to trial by jury in the Municipal Court of Kansas City, for a "petty offense" was not constitutionally mandated applying this Court's decision rendered in *Baldwin* v. *New York*, supra.

3. Whether or not it is constitutionally mandated by the First and Fourteenth Amendments to the U.S. Constitution "in obscenity cases only" that a trial by jury is required in the first instance (the Court of original jurisdiction, i.e., the first tier of a two-tiered judicial system) and that a trial by jury after appeal to the Circuit Court of Missouri (the second tier of the two-tiered judicial system in Missouri, where a de novo trial, by jury if requested, is guaranteed by absolute right) "does not satisfy the requirements of the Constitution". (127 U.S. at 557, 8 S. Ct. at 1307) (Pursuant to the provisions of the First and Fourteenth Amendments to the United States Constitution) (*City of Kansas City* v. *Darby*, 544 SW2d 529, 532) (Appendix A).

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Missouri Constitution of 1945, Article V, Sections 1, 5, and 14; Missouri Revised Statutes 1969, Sections 98.020, 478.070(4); Missouri Rules of Civil Procedure 37.53, 37.73, 37.78, and 37.84 (1975); Kansas City Charter, Section 396.5; Kansas City, Missouri Code, Sections 1.17, 22.1, 26.141-.144 are set forth verbatim in Appendix B to this statement.

STATEMENT

This case commenced August 9, 1973 when an Information was filed in the Municipal Court of Kansas City, Missouri charging Robert J. Darby with exhibiting obscene materials in violation of Section 26.142(d) and Section 1.17 of the Kansas City Code of General Ordinances. Trial of the case commenced August 23, 1973, at which time timely request for trial by jury was filed with the Municipal Court of Kansas City and overruled raising the Federal Question (Appendix C). After receiving the evidence the Municipal Judge found Robert Darby guilty and affixed his punishment to be ninety (90) days confinement. Timely appeal was filed to the Circuit Court of Jackson County, Missouri, Sixteenth Judicial Circuit (Tr. 2), and after disposing of preliminary motions said Court proceeded to grant Robert J. Darby a trial de novo, by jury (Tr. 1-244, inclusive). The jury, by unanimous verdict, convicted Robert J. Darby February 28, 1974, of knowingly exhibiting obscene materials and affixed his punishment at one hundred twenty (120) days confinement and a Five Hundred Dollar ($500.00) fine (Tr. 244). Timely motions for new trial were filed and by the Court overruled (Tr. 245-247), and

timely notice of appeal to the Missouri Court of Appeals, Kansas City District, was filed with the Trial Court June 17, 1974 (Tr. 249-250). Thereafter, the matter was submitted on briefs and oral argument to the Missouri Court of Appeals, Kansas City District, which rendered its original judgment (Appendix A) on March 29, 1976. Timely motions to transfer said case to the Supreme Court of Missouri were filed with the Missouri Court of Appeals, Kansas City District, and with the Supreme Court of Missouri, which transfer was granted by the Supreme Court June 15, 1976. Thereafter, the matter was submitted on briefs and oral argument to the Supreme Court of Missouri, which rendered its judgment (Appendix A) on December 13, 1976, which judgment reversed the decisions of the three lower courts, holding that "in obscenity cases only" a trial by jury was required in the first instance and that a trial by jury after appeal to the Circuit Court "does not satisfy the requirements of the Constitution", in conformity with its earlier opinion in *McNary* v. *Carlton*, 527 SW2d 343 (Mo. banc, 1975).

A timely motion for rehearing was denied January 10, 1977 (Appendix A). Notice of appeal to this Court was filed in the Supreme Court of Missouri April 5, 1977 (Appendix A).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented by this appeal are substantial and of broad public importance. The Supreme Court of Missouri has ignored binding precedential decisions of this Court and has exceeded the judicial power granted it by the Missouri Constitution in holding the right to trial by

jury, in obscenity cases only, to be an absolute jurisdictional prerequisite in the prosecution of "petty offenses" in Police Courts of the State of Missouri, when there is an absolute appellate right to a trial de novo, with a jury, at the second tier of Missouri's constitutionally approved two-tier judicial system.

The synthesis of this uniquely specialized right to trial by jury, in obscenity cases only, notwithstanding the fact that they are "petty offenses" will have far-reaching national consequences in many jurisdictions other than Missouri. The Appellant herein, Kansas City, a constitutionally chartered municipal corporation of the State of Missouri, is faced with two alternatives; one, the complete cessation of prosecutions under its Obscenity Ordinance in the Municipal Court of Kansas City; or two, to make provision to provide juries in the trial of "petty offense" obscenity cases within the Municipal Court of Kansas City, at substantial cost to the taxpayers when such a trial is already provided for, as a matter of absolute right, at the First Appellate level in Missouri's two-tiered judicial system. While both alternatives are unpalatable to the City, the second alternative is doubly unpalatable in that with the Municipal Court of Kansas City not being a court of record, and the Rules of Civil Procedure being as they presently are, a Defendant would have a right to two jury trials rather than one, thereby completely frustrating the judicial system.

I. The First Amendment to the United States Constitution Does Not Mandate That the Question of Obscenity Vel Non Is Solely to Be Decided by a Jury Pursuant to This Court's Holdings in the Cases of Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419; Hamling v. United States, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590; Jenkins v. Georgia, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642, and That Such a Holding by the Supreme Court of Missouri, in the Case of McNary v. Carlton, 527 SW2d 343 (Mo. Banc, 1975) Is Misplaced.

On June 24, 1974, the United States Supreme Court handed down the decisions of *Hamling* v. *United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 and *Jenkins* v. *Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642. On October 14, 1974, the Supreme Court of Missouri rendered its decision in the case of *S.S. & W., Inc.* v. *Kansas City*, 515 SW2d 487 (Mo., 1974), appeal dismissed 421 U.S. 925, 44 L. Ed. 2d 83, 95 S. Ct. 1650 (1975). *S.S. & W., Inc.* upheld the Kansas City Obscenity Ordinance, Sections 26.141-.144 (Appendix B) substantively and procedurally applying the tests required by *Miller* v. *California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). It should be noted in the Missouri Supreme Court decision that Judge Siler's dissent in the *S.S. & W., Inc.* case included references to *Hamling* and *Jenkins*. September 8, 1975, the Supreme Court of Missouri, en banc, handed down its opinion in the case of *McNary* v. *Carlton*, 527 SW2d 343, in effect, establishing by judicial decree, additional substantive rights with regard to trial by jury on the question of obscenity vel non. The Court stated in that opinion, l.c. 346:

> "In *Hamling* and *Jenkins*, the Court explained and elaborated upon the *Miller* holding. We must, of course, recognize the impact of these decisions and, where appropriate, *establish procedures in Missouri* which will represent meaningful compliance with their dictates." (Emphasis supplied)

At l.c. 347, the Court stated:

> "In 'obscenity' cases, we believe that we should 'rely on the jury system' (413 US at 26, 93 S. Ct. 2607), and require that jurors be involved as triers of fact under the *Miller* guidelines. The imposition of such requirement by this court means that it will be 'constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to the contemporary community standards . . .' 418 US at 157, 94 S. Ct. at 2753."

Such judicial legislation is prohibited by Article V, Section 5 of the Missouri Constitution of 1945, which section reads as follows:

> "Section 5. Rules of Practice and Procedure—Duty of Supreme Court—Power of Legislature.—The Supreme Court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

The legislative body of Kansas City, Missouri, the City Council, is authorized by its duly adopted Home Rule Charter to establish and fund a Municipal Court to try "petty offenses" for ordinance violations. Said Council, by the

adoption of Section 22.1 of its Code of Ordinances (Appendix B), has made a legislative determination that trial by jury within the Municipal Court of Kansas City, Missouri would not be consistent with the expeditious handling of a petty offense case docket that approaches 300,000 cases per year. While the Supreme Court of Missouri could not dictate that the legislative body of the City must provide trial by jury, it accomplished the same result by denying a jurisdictional basis for an otherwise constitutionally permissible ordinance. *Hamling* stands for the proposition that there is not a uniform nationwide standard of what is obscene. *Jenkins* stands for the proposition that, as a matter of law, juries in the State of Georgia are unable to legally determine that which is obscene. It is quite clear that there is no direct mandate in *Miller*, *Hamling* or *Jenkins* that the question of obscenity vel non is solely to be decided by a jury. Significantly, it is the manner in which the Supreme Court of Missouri has perceived what they described as the emphasis which *Miller* and *Hamling* placed upon the unique qualification of jurors to apply contemporary community standards. Assuming, arguendo, that the Trial Judge does not have the propensities of a "reasonable" person as mandated by tort law, neither was a Georgia jury "reasonable" in the case of *Jenkins*. The instructions given by the Missouri Supreme Court, in *McNary*, and as further applied in *Darby*, mandate that the obscenity issues be tried by jury, that the Court instruct the jury under *Miller* requirements and that the Trial Court *should* accept a verdict on the question of obscenity if supported by three-fourths of the members of the jury panel. The Trial Court must, however, in the event of an affirmative finding of obscenity by the jury, independently determine the constitutional question of whether the "materials depict or describe patently offensive 'hard core' sexual

conduct". If the verdict of the jury is that the materials are not obscene, the Trial Court, under Missouri Law, *should* be precluded from making the independent determination of the constitutional question of whether or not the "materials depict or describe patently offensive 'hard core' sexual conduct". It should be additionally noted that in the trial of a case before the Municipal Court of Kansas City, or any Municipal Court in Missouri, under the present court rules, 37.53 Missouri Rules of Civil Procedure, the Trial Judge is prohibited from instructing the jury, thereby preventing the jury from being knowledgeable of the "*Miller* guidelines". The Supreme Court of Missouri could have as easily taken a lesson from *Jenkins*, and found that jurors were not uniquely qualified to apply "contemporary community standards" in an evenhanded constitutionally permissible manner as mandated by *Miller*. Neither *Miller*, *Hamling*, *Jenkins* nor *McNary* were required to address the question of "petty offense" obscenity violations. This Court has ruled, in *Baldwin* v. *New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970), that a trial by jury is not mandated by the Fourteenth Amendment to the U.S. Constitution when the maximum possible punishment by incarceration for the offense does not exceed six months. Such is the case in the Municipal Court of Kansas City pursuant to the provisions of Section 1.17 General Ordinances of Kansas City (Appendix B). Such was the case when this Court dismissed for want of a substantial Federal question, *Cole* v. *Nigro* (ante). It is respectfully submitted that for the foregoing reasons that the Supreme Court of Missouri's synthesis of new substantive rights to trial by jury, in obscenity cases only, pursuant to the provisions of the First and Fourteenth Amendments to the United States Constitution, presents a substantial question necessitating review by this Court.

II. It Is Not Constitutionally Permissible for the Supreme Court of Missouri to Ground Its Decision in This Instant Case Upon the Case of Callahan v. Wilson, 127 U.S. 540, 8 S. Ct. 1301, 32 L. Ed. 223 (1888), When Such Case Was Impliedly Overruled by This Court in Its Dismissal, for Want of a Substantial Federal Question, of the Case of State ex rel. Cole v. Nigro, 471 SW2d 933 (Mo. Banc, 1971); Appeal Dismissed 404 U.S. 804, 30 L. Ed. 2d 36, 92 S. Ct. 122; Reh. Den. 404 U.S. 960, 30 L. Ed. 2d 278, 92 S. Ct. 309, Which Case Held That a Right to Trial by Jury in the Municipal Court of Kansas City, for a "Petty Offense" Was Not Constitutionally Mandated Applying This Court's Decision Rendered in Baldwin v. New York, Supra.

An examination of the Jurisdictional Statements and the Petitions for Rehearing filed by counsel for the Appellant, Berniece W. Cole, in this Court in the October Term, 1971, in Case No. 70-5140, seeking review of the case of *State ex rel. Cole* v. *Nigro*, 471 SW2d 933 (Mo. banc, 1971) reveals that Appellant's theory was grounded in the fact that *Baldwin* v. *New York*, supra, and *Missouri* v. *Lewis*, 101 U.S. 22 (1880), the cases upon which the Supreme Court of Missouri relied in reaching its decision in *Nigro*, had not overruled *Callahan* v. *Wilson*, 127 U.S. 540, 8 S. Ct. 1301, 32 L. Ed. 223 (1888). *Callahan* was also a major cornerstone in Petitioner's Petition for Writ of Mandamus to the Supreme Court of Missouri in *Nigro*. In 1971, the Supreme Court of Missouri, notwithstanding the emphasis placed upon *Callahan* by the Petitioner Cole, neglected to mention said case in its decision in *Nigro*. Of course, in that case, the Supreme Court of Missouri and this Court were measuring the due process guarantees of the Fourteenth Amendment against the Sixth Amendment right to jury

trial; however, the incongruity of failing to provide a jury trial on the issue of ultimate guilt or innocence, in the Court of original jurisdiction under the Sixth and Fourteenth Amendments to the United States Constitution, while mandating that a jury must be provided, in the Court of original jurisdiction, in the trial of a "petty" offense, on the issue of obscenity vel non, is incongruous, to say the least. Direct resolution of this question is necessary to provide guidance to the Courts of Missouri and the Courts of every jurisdiction of this country, utilizing a two-tiered court system for the trial of "petty" offenses.

The maximum authorized punishment has been the critical standard in measuring whether or not an offense is serious or petty. This Court held, in *Duncan* v. *Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 491, 88 S. Ct. 1444 (1968), reh. den. 392 U.S. 947, 20 L. Ed. 2d 1412, 88 S. Ct. 2270 (1968):

> ". . . But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment . . . The penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments . . . of the crime in question." 391 U.S. at 159, 20 L. Ed. 2d at 502.

In the case of *Baldwin* v. *New York*, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437 (1970), it was held:

> "Prior cases in this court narrow our inquiry and furnish us with a standard to be used in resolving this issue. In deciding whether an offense is 'petty', we have sought objective criteria reflecting the seriousness with which society regards the offense, . . . and *we have found the most relevant such criteria in the severity*

of the maximum authorized penalty. . . . Applying these guidelines, we have held that a possible six-month penalty is short enough to permit the classification of the offense as 'petty', . . ." (399 U.S. 66, 26 L. Ed. 2d at 440, Emphasis supplied.) . . . "This near-uniform judgment of the nation furnishes us with the only objective criteria by which a line could ever be drawn—between offenses which are and which are not regarded as 'serious' for the purposes of trial by jury. 26 L. Ed. 2d at 442 . . . where the accused cannot possibly face more than six months imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits which result from a speedy and inexpensive non-jury adjudication." (26 L. Ed. 2d at 443)

Appellants suggest that it is now irrelevant in the premises to make any inquiry as to the "common-law nature" of the offense to which *Darby* stood charged. The City Council of Kansas City has declared by its enactment of Section 1.17 of the General Ordinances of Kansas City (Appendix B) that this type of offense is not one which is serious enough to merit a trial by jury. Surely the thrust of the most recent decisions of the United States Supreme Court clearly indicate that where the Legislature has established the penal limits for any given offense, the maximum penalty that may be assessed is all that need be inspected to see if the offense is one which requires a trial by jury. In the premises, the maximum Five Hundred Dollar ($500.00) fine and/or six (6) months imprisonment falls below the line requiring a trial by jury, under the Sixth and Fourteenth Amendments to the United States Constitution and under the First and Fourteenth Amendments to the United States Constitution.

III. It Is Not Constitutionally Mandated by the First and Fourteenth Amendments to the United States Constitution, "in Obscenity Cases Only", That a Trial by Jury Is Required in the First Instance (the Court of Original Jurisdiction, i.e., the First Tier of a Two-Tiered Judicial System); a Trial by Jury After Appeal to the Circuit Court of Missouri (the Second Tier of the Two-Tiered Judicial System in Missouri, Where a De Novo Trial, by Jury If Requested, Is Guaranteed by Absolute Right) Does Satisfy the Requirements of the Constitution.

This Court, in June of 1976, handed down two additional cases involving two-tiered State Judicial Systems construing the Defendants' rights to Fourteenth Amendment due process over alleged deficiencies in the procedures implemented in the Court of original jurisdiction, the first tier court; those cases were *North* v. *Russell*, ... U.S. ....., 49 L. Ed. 2d 534, 96 S. Ct. ..... (1976) and *Ludwig* v. *Massachusetts*, ... U.S. ....., 49 L. Ed. 2d 732, 96 S. Ct. ..... (1976). *North* involved an alleged deprivation of due process guarantees by trial at the original Trial Court level by a non-lawyer Judge, which due process guarantees were fulfilled by an absolute right to appeal and trial de novo at the second tier of the two-tiered system. *Ludwig* involved an attack on Massachusetts' two-tiered court system where no trial by jury was available at the first tier. The *Ludwig* case is analogous to the situation in Missouri. The Court held, in *Ludwig*:

> "The standard against which we judge whether the Massachusetts two-tier system violates an individual's constitutional right to trial by jury is the Fourteenth Amendment's guarantee that no person may be deprived 'of life, liberty or property without due process of law.' In giving content to this sweeping proscription

in the jury trial context, the court in the past has considered two distinct issues; whether a state is ever obliged to grant an accused a jury trial, and whether certain features of the 18th Century common-law jury are inherent in the right." (49 L. Ed. 2d at 738) . . . "Only when an accused is charged with a 'petty' offense, usually defined by reference to the maximum penalty that might be imposed, does the Constitution permit the Federal Government and the State to deprive him of his liberty without affording him an opportunity to have his guilt determined by a jury. (Citing Baldwin v. New York) . . . These two issues are not again in controversy in the present case. It is indisputable that the Massachusetts two-tier system does afford an accused charged with a *serious offense* the absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution. Within the system, the jury serves its function of protecting against prosecutorial and judicial misconduct. It does so directly at the second tier of the Massachusetts system, and it may also have an indirect effect on first-tier trials. . . . This is not to say that we are unaware of a remote possibility that an accused in Massachusetts may be faced at his first trial with an overzealous prosecutor and a Judge who is either unable or unwilling to control him. But, in such case, he may protect himself from questionable incarceration by appealing and insisting on a trial by jury." (49 L. Ed. 2d at 739, Emphasis supplied)

The Court, in this case, as they did in *Baldwin*, and in *Williams* v. *Florida*, 399 U.S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893, l.c. 26 L. Ed. 2d 475, refused to disturb the holding in *Callahan* v. *Wilson*, on the basis that *Callahan* was applicable to the Federal Judicial System alone, and not binding

precedent upon the State Court System, as applied through the Fourteenth Amendment to the United States Constitution. Therefore, it is respectfully submitted that the Supreme Court of Missouri's reliance on *Callahan*, in support of their judgment in *Darby*, is misplaced and for this reason, and this reason alone, jurisdiction of this appeal should be accepted.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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414 E. 12th Street
Kansas City, Missouri 64106
Telephone: (816) 274-1710
Attorneys for Appellant

TRANSCRIPT ON APPEAL

Kansas City, Plaintiff
VS.

IN THE MUNICIPAL COURT,
KANSAS CITY, MISSOURI,

Division No.	Case No.
I	136762

State of Missouri)
County of Jackson) SS.
City of Kansas City)

Robert J. Daley
efendant

Information filed on August 16, 1973, charging defendant with the violation of Section 26.142 D, Revised Ordinances of Kansas City, Missouri, as amended. The defendant was duly brought into court and said cause being set for trial on or continued to August 24, 1973, at which time the defendant pleads not guilty and evidence heard and cause submitted to the Judge therein, said Judge finds defendant guilty and imposes upon said defendant for such offense the following judgment:

Sentence: 90 days ..... months ..... year

.....

and

.....

Fine $ ..... Cost $ ..... Total $ ..... Transcript Fee $5.00 GRAND TOTAL $ 5.00

Wherefore, it is adjudged by the court that Kansas City, Missouri, have and recover of and from said defendant the grand total sum indicated above and/or stand committed until discharged by due course of law.

Defendant having filed affidavit for appeal as provided by law, such appeal is allowed, and I hereby certify that the foregoing if a full, true, and complete transcript of all the proceedings had before me in the above entitled cause, and that such transcript is accompanied by all process and other papers filed in said cause.

Witness my hand
this date: AUG 24 1973

Judge of the Municipal Court

BEST COPY AVAILABLE

CIRCUIT COURT OPINION

IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT,
DIVISION NO. FOUR,

CRIMINAL DIVISION "C."
No. 5457

CITY OF KANSAS CITY, MISSOURI,
Plaintiff,

vs.

ROBERT J. DARBY,
Defendant.

Instructions of the Court are given, arguments of counsel for their respective parties, the jury retires to the jury room to deliberate in the custody of Tom Blake, bailiff, who was duly sworn to take charge of the same to consider their verdict and after due deliberation said jury returns into open Court with the following verdict in words and figures as follows, to-wit:

> "We, the jury, find the defendant guilty of the offense of knowingly exhibiting obscene materials, and we affix his punishment at 120 days confinement, $500.00 fine.
>
> s/ Donald L. Flanegin
> Foreman

Instructions Numbers 1-10 (both inclusive) marked "Given" are filed herein

Instructions Letters A-E marked "Refused" are filed herein

It is ordered by the Court that said defendant be given a total of Thirty (30) days to file Motion for New Trial.

It is further ordered by the Court that the defendant's present bond continue in effect.

MISSOURI COURT OF APPEALS, KCD, OPINION

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

KCD 27,444

CITY OF KANSAS CITY, MISSOURI,
Respondent,

vs.

ROBERT J. DARBY,
Appellant.

KCD 27,464

CITY OF KANSAS CITY, MISSOURI,
Respondent,

vs.

EDGAR E. HERZMARK,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI, HONORABLE ALVIN C. RANDALL, JUDGE

(FILED MARCH 29, 1976, MARY LOUISE THOMAS,
CLERK, Missouri Court of Appeals K.C. Dist.)

Before Turnage, P.J., Welborn and Higgins, Sp. JJ.

Appeals from judgments of conviction for violation of Kansas City ordinance by exhibiting obscene motion pictures. Both appellants were found guilty in Municipal Court and appealed to Circuit Court. On de novo jury trial in circuit court, Robert J. Darby was found guilty and sentenced to 120 days' confinement and $500 fine. At de novo trial of Edgar E. Herzmark, jury failed to agree on guilt and was discharged. Thereafter defendant withdrew request for jury trial and stipulated that defendant exhibited

the movies in question and that they are obscene, applying the standards of Miller v. California, 413 U.S. 15 (1973). Thereupon the court entered a finding of guilt and assessed a fine of $500.00.

With the exception of one point advanced by Darby, the contentions of both appellants in this court are identical and their briefs on such points are likewise identical.

Both contend first that the procedure required to be employed in the enforcement of the ordinance deprived them of the due process requirement of trial by jury prescribed by Miller v. California, supra, and therefore the Municipal Court lacked jurisdiction over the charges originally and the Circuit Court derivatively acquired no jurisdiction.

After extensively arguing that Miller v. California, supra, guarantees them a trial by jury in the first instance in the municipal court, appellants conclude that, inasmuch as the Kansas City Ordinance § 22.1 provides that "trial in the municipal court shall be by the court and not by the jury," the inability of that court to provide a trial by jury rendered void the entertainment of jurisdiction by that court of these cases.

Appellants cite no authority for the proposition that the failure to grant a jury trial, if required, is a jurisdictional defect. Their mere assertion of that conclusion does not make it so and they have the burden of establishing the correctness of their assertion.

Despite the ordinance above referred to, remedies do exist whereby the right of trial by jury in the municipal court may be enforced. See State ex rel. Cole v. Nigro, 471 S.W. 2d 933 (Mo. banc 1971). Appellants moved for a jury trial there but, insofar as the records here disclose, took no action otherwise to enforce their claimed right.

Darby did obtain a trial by jury in his de novo trial in the circuit court and Herzmark has stipulated that the films he was charged with exhibiting were obscene, the issue which Miller holds must be determined by a jury.

The municipal court had jurisdiction of the subject matter of the causes before it and had jurisdiction of the persons of the appellants. The failure to provide a jury trial, if it was required, has not been shown to have deprived that court of jurisdiction, and the circuit court likewise had jurisdiction of the appeals before it.

Appellants' arguments that the Kansas City ordinance is impermissibly vague and overly broad have been determined adversely to appellants by the Supreme Court of Missouri (Kansas City v. O'Connor, 510 S.W. 2d 689 (Mo. banc 1974); S.S. & W. Inc. v. Kansas City, 515 S.W. 2d 487 (Mo. 1974)) and more significantly, insofar as federal constitutional guaranties are relied upon, by the United States Supreme Court. S.S. & W. Inc. v. City of Kansas City, 421 U.S. 925 (1975). Obviously this court cannot re-examine these contentions.

Appellants argue that the ordinances are unconstitutional as applied to them because they are alleged to have shown the films in August, 1973, whereas the "authoritative construction" of the Kansas City ordinance in O'Connor, supra, did not occur until 1974. They contend that they did not have due notice of the illegality of their conduct. This argument is without merit. O'Connor was charged with having exhibited an obscene film in 1971, prior even to the Miller decision in June, 1973, and O'Connor's conviction was affirmed by the Supreme Court en banc.

Appellants' argument, based upon Bouie v. Columbia, 378 U.S. 347 (1964), that O'Connor was an "unforeseeable state court construction" of a criminal statute which could

not subject a person to criminal liability for past conduct, is without merit. A similar argument, based upon Bouie, supra, with respect to Miller, was rejected by the United States Supreme Court in Hamling v. United States, 418 U.S. 87 (1974).

Appellants' contention that the ordinance is void for lack of procedural safeguards against suppression of protected expression has been rejected in O'Connor and S.S. & W. Inc., supra. Again, this court cannot re-examine this contention. Furthermore, the record in neither of these cases shows that the films involved were seized by city officials. No constitutional question, present in seizure situations, exists where there is no seizure of the allegedly obscene materials. State v. Shouse, 519 S.W. 2d 13 (Mo. 1975).

Appellant Darby has assigned as error the trial court's overruling his "Motion to Dismiss Jury Panel, or, in the Alternative, to Dismiss Information." That motion was premised on the grounds that by reason of § 22 (b), Art. I, Const. of Mo. 1945, permitting a woman to be excused from jury duty on request, the panel was not a truly representative cross section of the community, particularly the female population, and such discrimination deprived him of due process and equal protection of the laws as guaranteed by the Constitution of the United States. There is no need to detail appellant's argument.

Although his motion was captioned as stated in his point above, the motion sought only dismissal of the information. It did not request that the jury panel be quashed. Thus the opening paragraph of the motion is:

"Comes now the defendant, Robert Darby, by his undersigned counsel and moves this Court to dismiss the information against him for the reason, in the selection of

a jury, Missouri law denies him due process of law and the equal protection of the laws."

The concluding paragraph is:

"For these reasons the information against defendant should be dismissed."

The composition of the jury panel had nothing to do with the validity of the charge against appellant. The trial court is not to be held to have erred in overruling appellant's motion.

It might be noted that the motion was filed February 26, 1974, and the trial did not begin until February 27, 1974. No specific reference to the jury panel actually called for the trial appears in the motion. In any event, dismissal of the information is not the proper method to remedy the deficiency alleged by appellant, if it be such.

Judgments affirmed.

Robert R. Welborn
Special Judge

All concur.

SUPREME COURT OF MISSOURI OPINION

SUPREME COURT OF MISSOURI
en banc

No. 59595

CITY OF KANSAS CITY, MISSOURI,
Respondent,

vs.

ROBERT J. DARBY,
Appellant.

CITY OF KANSAS CITY, MISSOURI,
Respondent,

vs.

EDGAR E. HERZMARK,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF MISSOURI, SIXTEENTH JUDICIAL CIRCUIT, HONORABLE ALVIN C. RANDALL, JUDGE

(DUPLICATE OF FILING ON DECEMBER 13, 1976, IN OFFICE OF CLERK, SUPREME COURT)

These cases involve the law relating to obscenity. The judgments of conviction were affirmed by the Missouri Court of Appeals, Kansas City District. On June 15, 1976, both cases were transferred to this Court by this Court. They will be determined here "the same as on original appeal." Mo. Const. Art. V, § 10.

CITY OF KANSAS CITY vs. DARBY:

Robert J. Darby was charged in the Municipal Court of Kansas City, Missouri, with exhibiting an obscene motion picture on August 9, 1973, in violation of an ordinance

of Kansas City. He was tried in the Municipal Court, without a jury, and was convicted. He appealed to the Circuit Court of Missouri, Sixteenth Judicial Circuit.

In the Circuit Court, Darby filed several pre-trial motions. Among these was a Motion to Dismiss which asserted, in part, that the charges pending against him should be dismissed because he "was denied in the Municipal Court trial below the right to have community standards with regard to the question of obscenity determined by a jury * * *." The motion to dismiss was overruled, the cause proceeded to trial before a jury, Darby was convicted, and his punishment was fixed at "hundred twenty days confinement, five hundred dollar fine."

The parties agree that the Municipal Court was barred by ordinance from providing Darby with a trial by jury.

In Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the United States Supreme Court reformulated the constitutional tests for determining obscenity under the First and Fourteenth Amendments to the Constitution of the United States. In Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), the Court explained the *Miller* holding. In McNary v. Carlton, 527 S.W.2d 343 (banc 1975), this Court construed *Miller*, as explained in *Hamling*, to mean that, in determining obscenity under the First and Fourteenth Amendments, a jury determination of contemporary community standards is constitutionally required.

Accordingly, we must conclude that a constitutionally acceptable determination of obscenity cannot be made in the Municipal Court in Kansas City because no jury is available.

The question presented in the Darby case is whether this constitutional deficiency can be cured by the process

of allowing an appeal to the circuit court and making a jury available there.

In Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888), Callan was charged with conspiracy in the Police Court of the District of Columbia and convicted. He perfected an appeal to the Supreme Court of the District of Columbia (in which a trial by a jury would have been available to him), withdrew the appeal and was committed to the custody of the Marshal. On appeal to the United States Supreme Court, he contended "that the Constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine upon him, or to order him to be imprisoned until such fine was paid." The Supreme Court sustained his contention, and said (127 U.S., at 557):

"* * * Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged. In such cases a judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and

the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty."

We consider the *Callan* holding extremely persuasive. If it is to be followed, Darby should be discharged.

First, however, we must consider the possible impact of Ludwig v. Massachusetts, ... U.S. ....., 96 S.Ct. 2781, 49 L.Ed.2d 732, decided by the United States Supreme Court on June 30, 1976.

In *Ludwig*, the accused was convicted in the District Court of Northern Norfolk in a proceeding in which no jury was available. He then asserted his statutory right to a trial de novo before a jury. In the de novo proceeding he asserted that he had been deprived of his federal constitutional right to a speedy jury trial in the first instance, and that he had been subjected to double jeopardy. At the second trial he was again convicted. The Supreme Court of the United States rejected his assertions and held that the Massachusetts "two-tier" court system violated neither his Fourteenth Amendment right to a trial by jury nor the double jeopardy clause of the Fifth Amendment. The significant language in Ludwig, for our purposes, is as follows (96 S.Ct., at 2787, 49 L.Ed.2d at 741):

"Our disposition of this case does not require us to disturb the holding in Callan v. Wilson, 127 US 540, 32 L Ed 223, 8 S Ct 1301 (1888). In Callan, this Court considered the validity of a District of Columbia two-tier trial system that provided for trial by jury only in the second tier. The Court announced: 'Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted

for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged.' Id., at 557, 32 L Ed 223, 8 S Ct 1301.

"Reconsideration of Callan is not required here for two reasons. First, as the Court there recognized, the sources of the right to jury trial in the federal courts are several and include Art III, § 2, cl 3, of the Constitution. That provision requires, in pertinent part, that '[t]he trial of all Crimes . . . shall be by Jury.' This language, which might be read as prohibiting, in the absence of a defendant's consent, a federal trial without a jury is, of course, not applicable to the States. Second, to the extent that the decision in Callan may have rested on a determination that the right to trial by jury in a serious criminal case was unduly burdened by a requirement that an accused first be tried without a jury, it is not controlling here. Unlike the District of Columbia system, which apparently required that an accused be 'fully tried' in the first tier, 127 US, at 527, 32 L Ed 223, 8 S Ct 1301, Massachusetts permits an accused to short-circuit trial in the first tier by admitting to sufficient findings of fact."

We recognize that the *Ludwig* holding casts a shadow on the holding in *Callan*. However, the *Ludwig* opinion disavows any intention of overruling *Callan*, and we consider the *Callan* holding and result uniquely appropriate in situations involving resolution of obscenity issues under the *Miller* guidelines. In *Miller*, the Court noted "that obscene material is unprotected by the First Amendment" but then acknowledged "the inherent dangers of undertaking to regulate any form of expression." (413 U.S., at 23). In our view, we are free to follow the *Callan* holding, and we believe we should apply it to a situation where First Amendment rights are involved.

In Blount v. Rizzi, 400 U.S. 410, 416-417, 91 S.Ct. 423, 428, 27 L.Ed.2d 498, 503 (1970), the Supreme Court of the United States cautioned that ". . . Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.' *Marcus* v. *Search Warrant*, 367 U. S. 717, 731 (1961). Rather, the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line. . . . Our insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards . . . is . . . but a special instance of the larger principle that the freedoms of expression must be ringed about with adequate bulwarks. . . .' *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963). Since we have recognized that 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated . . . is finely drawn. . . . [t]he separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . .' *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958)."

We held in *McNary* that a person is entitled to freedom of expression, in areas of alleged obscenity, *until* a jury of his peers declares otherwise. We merely reaffirm the *McNary* holding today and give it practical effect. The essential question is whether it is constitutionally permissible to allow a municipal judge to restrict freedom of expression prior to the time a jury is made available in circuit court. We think not.

We hold, *in obscenity cases only*, that a trial by jury is required in the first instance and that a trial by jury after appeal to circuit court "does not satisfy the requirements of the Constitution." (127 U.S., at 557).

We recognize that today's holding renders the Kansas City obscenity ordinance unenforceable so long as juries are not permitted in Kansas City municipal courts. However, the chief executive officer of Kansas City, or its city attorney, may proceed under Section 563.285, RSMo 1969, in matters of alleged obscenity.

The judgment is reversed, and the cause remanded with directions to discharge Darby from custody.

CITY OF KANSAS CITY v. *HERZMARK:*

Edgar F. Herzmark was charged in the Municipal Court of Kansas City, Missouri, with exhibiting two obscene motion pictures on July 23, 1973, in violation of an ordinance of Kansas City. He was tried in the Municipal Court, without a jury, and was convicted. He appealed to the Circuit Court of Missouri, Sixteenth Judicial Circuit.

In the Circuit Court, he received a trial and the jury was unable to reach a verdict. He then stipulated that for the purposes of this case only the films are obscene under the *Miller* guidelines, withdrew his request for jury trial, was found guilty of exhibiting obscene materials, and his punishment was assessed at a fine of five hundred dollars.

Herzmark first asserts on appeal that he was deprived of trial by jury as prescribed by *Miller*. The assertion is without merit. He stipulated the motion pictures are obscene.

Herzmark next asserts that the Kansas City ordinance is impermissibly vague and overly broad. The assertion

is without merit. Kansas City v. O'Connor, 510 S.W.2d 689 (Mo.banc 1974).

Herzmark finally asserts that the Kansas City ordinance is invalid in that it provides no procedural safeguards against the suppression of protected expression as required by Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), and Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). The assertion is without merit. Kansas City v. O'Connor, supra.

The judgment is affirmed.

Robert T. Donnelly, Judge

Morgan, Bardgett, Henley and Finch, JJ., concur; Seiler, C.J., concurs as to Darby, concurs as to Herzmark under compulsion of Kansas City v. O'Connor, 510 S.W.2d 689 (Mo.banc 1974); Holman, J., dissents.

MISSOURI SUPREME COURT ORDER DENYING MOTION FOR REHEARING

CLERK OF THE SUPREME COURT
State of Missouri
Jefferson City, Missouri
65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mail
P. O. Box 150

January 10, 1977

Mr. Dan Jackson III
Assistant City Attorney
28th Floor
City Hall
414 E. 12th
Kansas City, Missouri 64106

In re: City of Kansas City, Missouri vs. Robert J. Darby—City of Kansas City vs. Edgar E. Herzmark No. 59595

Dear Mr. Jackson:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Respondent City of Kansas City's motion for rehearing overruled. Rendlen, J., not participating."

Yours very truly,

/s/ Thomas F. Simon
Clerk.

/bh

cc: Thomas W. Tierney and Donald V. Pierce, Jr., Tierney, Mushkin & McGuire, 1730 Commerce Tower, 911 Main Street, Kansas City, Missouri 64105

IN THE
SUPREME COURT OF THE STATE OF MISSOURI

No. 59595

CITY OF KANSAS CITY, MISSOURI,
Respondent,

vs.

ROBERT J. DARBY,
Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the above-named Respondent hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Missouri, originally dated December 13, 1976, and thereafter entered on January 10, 1977 (rehearing denied January 10, 1977) reversing the judgment of the Missouri Court of Appeals, Kansas City District, dated March 29, 1976, which judgment affirmed the judgment of the Circuit Court of Jackson County, Missouri, dated February 28, 1974.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

AARON A. WILSON
City Attorney
2800 City Hall
411 E. 11th Street
Kansas City, Missouri 64106

and

DANIEL G. JACKSON III
Assistant City Attorney
2800 City Hall
411 E. 11th Street
Kansas City, Missouri 64106
(816) 274-1710
Attorneys for Respondent
By /s/ Daniel G. Jackson III

CERTIFICATE OF SERVICE

I, Daniel G. Jackson III, one of the attorneys for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 4th day of April, 1977, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, on Thomas W. Tierney, 1730 Commerce Tower, Kansas City, Missouri 64105, Attorney for Robert J. Darby, by mailing a copy in a duly addressed envelope, with postage prepaid.

It is further certified that all parties required to be served have been served.

/s/ Daniel G. Jackson III

CLERK OF THE SUPREME COURT
State of Missouri
Jefferson City, Missouri
65101

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mail
P. O. Box 150

April 5, 1977

Mr. Dan G. Jackson, III
Assistant City Attorney
28th Floor, City Hall
Kansas City, Missouri, 64106

In re: City of Kansas City, Missouri vs. Robert J. Darby—No. 59595

Dear Sir:

This acknowledges receipt of notice of appeal to the United States Supreme Court which has this day been filed in the above-entitled cause and is reflected in the records of this Court.

This office has confirmed today by telephone to the United States Supreme Court that certified copies of the record are not forwarded to that Court until we are notified by it that jurisdiction is being accepted.

The Office of Clerk of the Supreme Court referred this office to its Rule 12 wherein it is stated that "the filing of the record in this court is not required for docketing an appeal." Rule 21 covering certiorari contains approximately the same wording and the same procedure applies thereto.

We will, of course, keep your request on file and when the U. S. Supreme Court notifies this office that they are accepting jurisdiction, the certifications will be made.

Yours very truly,

Thomas F. Simon
/s/ Goldie Ketcham
By Goldie Ketcham
Chief Deputy Clerk

/gk

APPENDIX B

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Missouri Constitution of 1945, Article V

Section 1. Judicial power—constitutional courts.—The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrate courts, and municipal corporation courts.

* * *

Section 5. Rules of practice and procedure—duty of supreme court—power of legislature.—The supreme court may establish rules of practice and procedures for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose.

* * *

Section 14. Circuit courts—jurisdiction—sessions.—The circuit courts shall have jurisdiction over all criminal cases not otherwise provided for by law, exclusive original jurisdiction in all civil cases not otherwise provided for, and concurrent and appellate jurisdiction as provided by law. Such courts shall sit at times and places in each county as prescribed by law.

Missouri Revised Statutes 1969

§ 98.020. Appeals from police court

Appeals from police courts and for violation of an ordinance of a city, town or village shall be in the nature of a criminal appeal from a magistrate. And when an appeal is taken from the judgment of such police court, the defendant shall be required to give bond as in appeals in trials for misdemeanors before a magistrate, notwithstanding any ordinance or city charter to the contrary. If, on trial in the court having jurisdiction of such appeal, the defendant shall be convicted and fails or refuses to pay the costs and fine assessed against him, such fine and costs may be collected as if no appeal had been taken, and defendant may be committed to a workhouse or compelled to work out such fine and costs, as provided by law for collecting fines and costs in police courts when no appeal has been taken. (R.S.1939, § 7363)

§ 478.070 Jurisdiction of circuit courts

The circuit courts in the respective counties in which they may be held shall have power and jurisdiction as follows:

(4) Appellate jurisdiction from the judgment and orders of county courts, probate courts and magistrates, in all cases not expressly prohibited by law, and shall possess a superintending control over them, and a general control over executors, administrators, guardians, curators, minors, idiots, lunatics and persons of unsound mind. (R.S. 1939, § 2100, A. 1949 S.B. 1140)

Missouri Rules of Court 1976

37.53. Issues of Fact

(a) All issues of fact shall be tried by the judge except where trial by jury is authorized by law and the defendant or his attorney requests a trial by jury.

(b) Where trial by jury is authorized by law and the defendant or his attorney requests, a jury shall be selected in the manner provided for the selection of juries in misdemeanor cases tried in magistrate courts, except as otherwise provided by law. The jury so selected shall determine the facts and render a verdict.

(c) In cases tried by a jury the judge shall not comment on the facts. The judge may, with the consent of all parties, answer questions asked by jurors pertaining to the law applicable to the case.

37.73. Motion for New Trial—Not Required but Permitted

Except as otherwise required by law, no motion for a new trial shall be required as a condition for review on appeal. An appeal shall be granted as a matter of course on compliance with these Rules and any law governing same. Motions for a new trial may be filed within the time permitted for appeal and shall be considered and ruling made thereon by the court before the time for appeal expires in accordance with the findings of the court as to the commission of any substantial errors in the trial of the case and the judgment and sentence.

37.78. Appeal—Right—Time—Appellate Court

A defendant and the municipality shall be entitled to appeal from a judgment to the circuit court of the county or such other court having jurisdiction of such appeals within the time and in the manner provided by law.

37.84. Appeal—Trial

After an appeal from a judgment rendered in a municipal court has been entered upon the docket of the circuit or other court having jurisdiction of the appeal, the case shall be heard, tried and determined de novo in such circuit or other court as though the prosecution had originated in such court. If the defendant shall be convicted in such court, the judgment entered upon the finding or verdict shall assess the costs in both the municipal and such other court in the manner provided by law.

Kansas City Charter

Sec. 396.5 Appeals.

Appeals may be taken from the municipal court by the defendant and by the city to the circuit court in the manner and upon the conditions prescribed by law and rules of the Missouri Supreme Court. (C.S. No. 33041, § A(a), 11-8-66)

Kansas City, Missouri Code

§ 1.17. General penalty; continuing violations.

Whenever in any section of the Administrative Code or this Code of General Ordinances or in any ordinance, the doing of any act is required or is prohibited or is declared to be unlawful or a misdemeanor, and either no specific fine or penalty is provided for a violation thereof or a specific penalty of imprisonment for more than six (6) months is provided therefor, any such specific penalty provided by any such section or ordinance notwithstanding, any person who shall be convicted of a violation of any such provision of this codification or of any such ordinance shall, for each offense, be fined not less than one dollar ($1.00) nor more than five hundred dollars ($500.00) where no specific fine is provided, or the fine

so specifically provided where so provided, or be punished by imprisonment in the municipal farm or the women's reformatory, according to the sex of the person convicted, not to exceed six (6) months, or be punished by both fine and imprisonment.

Each day's violation of, or failure, refusal or neglect to comply with, any provision of this codification or of any other ordinance shall constitute a separate and distinct offense.

This section shall not apply to any section of this Code or to any ordinance in which there is expressly provided a penalty for its violation of imprisonment for a term not in excess of six (6) months. (R. O. 1956 S. 1.100 Ord. No. 38541, 7-17-70)

§ 22.1 Trial by court.

In all prosecutions for violations of any offenses under the Charter and ordinances, or either, trial in the municipal court shall be by the court and not by the jury. (C.S. No. 35644, § A, 8-16-68)

Ordinance No. 39144

§ 26.141. Definitions.

(a) Obscenity. Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or another especially susceptible audience. Undeveloped photographs, molds, printing

plates and the like, shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Person. As used in this article, the term "person" shall be taken to mean any natural person, firm, partnership, copartnership, association, corporation or organization of any kind or character. (Ord. 39144, 3-5-71)

§ 26.142. Offenses.

No person shall knowingly:

(a) Sell, deliver or provide, or offer or agree to sell, deliver or provide, any obscene writing, picture, record or other representation or embodiment of the obscene; or

(b) Present or direct an obscene play, dance or performance, or participate in that portion thereof which makes it obscene; or

(c) Publish, exhibit or otherwise make available any obscene material; or

(d) Possess any obscene material for the purpose of sale or other commercial dissemination; or

(e) Sell, advertise or otherwise commercially disseminate material, whether or not obscene, by representing or suggesting that such material is obscene; or

(f) Display, draw or write in any place open to or used by the public, any obscene material, representatations or drawings. (Ord. 39144, 3-5-71)

§ 26.143. Exceptions.

Nothing herein contained shall be deemed to prohibit dissemination of materials, otherwise in violation of this article, restricted to:

(a) Institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material; or

(b) Non-commercial dissemination to personal associates over the age of 18 years. (Ord. 39144, 3-5-71)

§ 26.144. Adjudication of obscenity.

In construing the meaning of the terms or phrases used in this article which relate to Federal Constitutional Principles, only such meanings or inclusion shall be adopted as have been settled by controlling majority adopted opinions of the Supreme Court of the United States and not otherwise where such opinions exist; provided further, it is the intent of this article not to adopt any non-controlling personal views or opinions of any justice or a number thereof less than the majority of the Supreme Court of the United States. (Ord. 39144, 3-5-71)

APPENDIX C

IN THE MUNICIPAL COURT OF
KANSAS CITY, MISSOURI

Nos. .....

OR (Overruled) 8-23-73 Judge Nigro

City of Kansas City, Missouri,
Plaintiffs,

vs.

Jim Lee, Robert Darby, Edward Herzmark, Sue Robertson,
Defendants.

REQUEST FOR TRIAL BY JURY

(FILED MUNICIPAL COURT, AUGUST 23, 1973,
CLERK, E. OSBORN)

Come now defendants herein and move this court for an order empanelling a jury for the trial of this action. Defendants are entitled to a jury to serve as a trier of fact to assess the legality of the movies herein by the standards of the community. Where there are no explicit standards by which a judge may determine the limits of community acceptance of sexually explicit material defendants are entitled to a trial by a jury composed of members of the community.

Respectfully submitted,

/s/ Arthur A. Benson II
Attorney at Law
1024 Commerce Tower
Kansas City, Missouri
(816) 842-7604
Attorney for Defendants

A copy of the above and foregoing was served this 23rd day of August, 1973, by handling a copy to Dan Jackson, Assistant City Counsellor, 2800 City Hall, Kansas City, Missouri.

/s/ Arthur A. Benson II

Supreme Court, U. S.
FILED
MAY 6 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1397

CITY OF KANSAS CITY, MISSOURI,
Appellant,

vs.

ROBERT J. DARBY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1397

CITY OF KANSAS CITY, MISSOURI,
Appellant,

vs.

ROBERT J. DARBY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the United States Supreme Court Rules, Appellee moves the Court to dismiss this appeal from the judgment and order of the Supreme Court of Missouri upon the grounds that said appeal is not within the jurisdiction of this Court and that the questions on which the decision of the lower Court rests do not present a substantial federal question.

In the alternative, Appellee moves the Court to affirm the aforementioned judgment and order on the ground that the questions on which the decision of the cause depends are quite limited in scope and have been thoroughly considered by the Supreme Court of Missouri, thereby requiring no further argument.

JURISDICTION

Appellant has sought to invoke the jurisdiction of this Court in accordance with the provisions of 28 U.S.C. 1257 (2). However, as is evident from the decision of the Supreme Court of Missouri (Juris. Statement, Appendix "A" p. 26) from which this appeal has been taken, the case of *City of Kansas City* v. *Darby*, does not draw into question the validity of a Missouri statute or ordinance "on the ground of its being repugnant to the Constitution, treaties or laws of the United States". 28 U.S.C. 1257(2). Accordingly, the questions presented by this appeal, standing alone, cannot be subject to review by this Court by way of an appeal. *DeBacker* v. *Brainard*, 396 U.S. 28, 32, 90 S.Ct. 163, 24 L.Ed.2d 148, 153 (1969); *Live Oak Water Users' Association* v. *Railroad Commission of California*, 269 U.S. 354, 46 S.Ct. 149, 70 L.Ed. 305 (1926). Therefore, appellee submits that said appeal should be dismissed.

STATEMENT

The facts comprising the basis of this appeal are correctly presented in the City Attorney's Jurisdictional Statement under the heading "Statement". The opinions of the Municipal Court of Kansas City, Missouri, the Circuit Court of Missouri, Sixteenth Judicial Circuit, Division 4, the Missouri Court of Appeals, Kansas City District and the Supreme Court of Missouri, en banc, are correctly set forth in Appendix "A" to the Jurisdictional Statement.

ARGUMENT

The Case Presents No Substantial Federal Question

The issue presented to the Supreme Court of Missouri by virtue of these proceedings was whether a constitutionally unacceptable judicial determination of obscenity by means other than a trial by jury can be cured by the process of allowing an appeal from such a determination by the Municipal Court of Kansas City, Missouri, the court of original jurisdiction, to the Circuit Court of Jackson County, Missouri, where a trial *de novo* by a jury is provided on appeal. Prior to the decision of *City of Kansas City* v. *Darby*, 544 S.W.2d 529 (Mo. banc 1976) (Juris. Statement, Appendix "A", p. 26) the Supreme Court of Missouri held in *McNary* v. *Carlton*, 527 S.W.2d 343 (Mo. banc 1975) that a jury determination of contemporary community standards is constitutionally required in determining obscenity under the First and Fourteenth Amendments to the United States Constitution. Clearly, Appellant is estopped from and has no standing to attack the decision rendered by the Supreme Court of Missouri in the case of *McNary* v. *Carlton*, supra. See 28 U.S.C. 1257; *Smith* v. *Indiana*, 191 U.S. 138, 24 S.Ct. 51, 48 L.Ed. 125 (1903); *Braxton County Court* v. *West Virginia*, 208 U.S. 192, 28 S.Ct. 275, 52 L.Ed. 450 (1908); *Marshall* v. *Dye*, 231 U.S. 250, 34 S.Ct. 92, 58 L.Ed. 206 (1913). Therefore, Appellant's first question, involving the precise issue decided by the *McNary* case, is without merit and should be dismissed for the reason that said question is not within the jurisdiction of this Court for purposes of these proceedings.

Appellant further contends in its first question that the Supreme Court of Missouri exceeded the authority granted to it under the Constitution of Missouri. Appellee submits

that said contention is misplaced for the reason that the constitutional provision referred to by Appellant, viz., Article V, Section 5 (Juris. Statement, Appendix "B", p. 39) pertains to the authority of the Supreme Court of Missouri to promulgate rules of practice and procedure for Missouri courts. Said provision has no relationship whatsoever to the authority of the Supreme Court to render decisions. Moreover, it is clear that whether or not a state court exceeded its functions under the state constitution cannot give rise to a question respecting due process of law which will sustain the appellate jurisdiction of this Court. *French* v. *Taylor,* 199 U.S. 274, 26 S.Ct. 76, 50 L.Ed. 189 (1905); *Rawlins* v. *Georgia,* 201 U.S. 638, 26 S.Ct. 560, 50 L.Ed. 899 (1906); *Burt* v. *Smith,* 203 U.S. 129, 135, 27 S.Ct. 37, 51 L.Ed. 121, 127 (1906).

On the basis of the foregoing, Appellee submits that Appellant's first question is without merit for the reasons that it is not within the jurisdiction of this Court and does not raise a substantial federal question.

Appellant suggests in its second question that the Missouri Supreme Court acted outside the scope of that which is constitutionally permissible by following this Court's decision in the case of *Callan* v. *Wilson,* 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888). Appellant contends that the *Callan* case has been overruled by this Court by reason of the dismissal, for want of no substantial federal question, entered in the case of *State ex rel. Cole* v. *Nigro,* 471 S.W.2d 933 (Mo. 1971), appeal dismissed, 404 U.S. 804, 92 S.Ct. 122, 30 L.Ed.2d 36 (1971). Appellee concedes that a dismissal for want of no substantial federal question is a decision on the merits of the case. *Hicks* v. *Miranda,* 422 U.S. 325, 344, 95 S.Ct. 2281, 45 L.Ed.2d 223, 236 (1975). However, this Court concluded in the *Nigro* case that the appeal therein

had to be dismissed for the reason that the constitutional challenge to the Kansas City, Missouri Code of Ordinances, §22.1 (Juris. Statement, Appendix "B", p. 43) was not a substantial one. Such conclusion was a decision on the merits as to the questions presented therein; but it clearly, was not meant to overrule *any* prior decisions of this Court. Illustrative of that fact is the viability of the *Callan* case which this Court recognized as recently as June 30, 1976 in the case of *Ludwig* v. *Massachusetts,* ..... U.S. ....., 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976) wherein the Court noted the *Callan* holding and determined that it was not necessary that it be disturbed. Id., 96 S.Ct. at 2787, 49 L.Ed.2d at 741. When an alleged federal question rests upon a false assumption, it affords no basis for the exercise of this Court's jurisdiction over a state court. *Parker* v. *McLain,* 237 U.S. 469, 35 S.Ct. 632, 59 L.Ed. 1051 (1915).

In addition, the issue opted for by the relator in *State ex rel. Cole* v. *Nigro,* supra, is clearly distinguishable from the question raised by Appellee in the case below. The *Nigro* case presented the question of whether a defendant, regardless of the nature of the crime alleged to have been committed, is entitled to a trial by jury pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §22(a) of the Missouri Constitution. The question presented by Appellee in *City of Kansas City, Missouri* v. *Darby,* supra, was whether it is permissible in the first instance for a judge, rather than a jury, to determine in obscenity prosecutions the factual issues of obscenity under the guidelines set forth in *Miller* v. *California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). The Supreme Court of Missouri held in response to the *Darby* question that it is not constitutionally permissible to allow a municipal judge to restrict freedom of expression without such a jury determination. Said holding is based on settled prin-

ciples set forth in previous decisions of this Court and of the Missouri Supreme Court. Therefore, Appellee submits that there is no substantial federal question present in Appellant's second question which forms a basis for review of the judgment of the Missouri Supreme Court by this Court. *Utley* v. *City of St. Petersburg*, 292 U.S. 106, 109, 54 S.Ct. 593, 78 L.Ed. 1155, 1158 (1934).

The third question presented by Appellant is that the First and Fourteenth Amendments to the United States Constitution do not require a trial by jury in obscenity prosecutions in the Municipal Court of Kansas City, Missouri. Appellant contends that the case of *Ludwig* v. *Massachusetts*, supra, is determinative of said question. This Court held in *Ludwig* that the Massachusetts "two-tier" court system did not violate the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments. In reaching its conclusion, this Court reviewed its previous decisions holding that a trial by jury is not *required* when an accused is charged with a "petty" offense, *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); *Baldwin* v. *New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) and that a jury of 12 is not *required* in criminal prosecutions, *Williams* v. *Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970); *Apodaca* v. *Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972). However, *Ludwig*, *Duncan*, *Baldwin*, *Williams* and *Apodaca* did not hold that it was constitutionally impermissible for a state to protect First Amendment freedoms by requiring that a trial by jury be made available in the first instance in obscenity cases. A state may choose the procedure it deems appropriate for the vindication of federal rights, unless such procedure closes the door to consideration of a claim that a federal right has been denied. *Young* v. *Ragen*, 337 U.S. 235, 238, 69 S.Ct. 1073, 93 L.Ed. 1333, 1336 (1949); *Loftus* v. *Illinois*, 334 U.S. 804, 68 S.Ct. 1212, 92 L.Ed. 1737 (1948). The jurisdiction of this Court to review the judgment of the Supreme Court of Missouri can be invoked only when a federal right which was claimed below was denied by its decision. *Parker* v. *McLain*, supra, 237 U.S. at 471, 59 L.Ed. at 1053 (1915). The judgment from which the appeal herein is taken did not deny federal rights, but rather provided for their vindication.

Appellant alleges that, by reason of the *Darby* decision, it has only two alternatives with respect to the enforcement of the Kansas City Obscenity Ordinance (Ordinance No. 39144, Juris. Statement, Appendix "B", pp. 43-45), viz.: (1) to cease prosecutions thereunder; or (2) to provide the right to trial by jury in such prosecutions in the Municipal Court of Kansas City, Missouri. Clearly, Appellant's assessment of its alternatives is erroneous. The city attorney for the City of Kansas City, Missouri has adequate remedies at his disposal to pursue the enforcement of obscenity violations under state statutes, without resorting to municipal court proceedings which deprive prospective defendants of due process of law. As was stated by the Missouri Supreme Court in *Darby* (Juris. Statement, Appendix "A", p. 32), the chief executive officer of Kansas City, or its city attorney, is a proper party to initiate proceedings under R.S.Mo. 1969, §563.285, which statute affords injunctive relief against the sale, distribution or publication of obscene material, while preserving the requisite due process protection of trial by jury. *McNary* v. *Carlton*, supra. Furthermore, the city attorney is likewise a proper party in actions for search and seizure of allegedly obscene material under the procedure outlined in R.S.Mo. 1969, §§542.281 and 542.301. The State of Missouri has provided adequate remedies for Appellant to utilize for the purpose of prosecuting alleged obscenity violations occurring within the corporate confines of Kansas City,

Missouri. Only when a state deprives a person or denies him enforcement of a right guaranteed by the Fourteenth Amendment can its protection and this Court's jurisdiction be invoked. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 72, 75 S.Ct. 614, 99 L.Ed. 897, 900 (1955). Therefore, Appellee submits that Appellant's third question presents no substantial federal question and accordingly, should be dismissed.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the questions presented by Appellant's jurisdictional statement, standing alone, are not jurisdictionally subject to review by this Court by way of appeal; and further, that said questions are so insubstantial as not to need or require further argument. Accordingly, Appellee respectfully moves this Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the case by the Supreme Court of Missouri.

Respectfully submitted,

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